

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Development of Devices Capable of Supporting	)	MB Docket No. 08-172
Multiple Audio Entertainment Services	)	

**REPLY COMMENTS  
OF  
IBIQUITY DIGITAL CORPORATION**

iBiquity Digital Corporation (“iBiquity”), by its attorneys, hereby submits these reply comments in the above-referenced proceeding. In these reply comments, iBiquity reiterates its belief that the competitive landscape created by the Commission’s approval of the Sirius/XM merger<sup>1</sup> makes it necessary for the Commission to require that HD Radio technology is included in SDARS receivers. The comments submitted in response to the Commission’s Notice of Inquiry<sup>2</sup> provide ample support for the adoption of this proposal. Even those comments that oppose the proposal have made the case that the marketplace will be competitively dysfunctional absent a requirement that HD Radio technology is included in SDARS receivers.

As iBiquity demonstrated in its comments, Sirius XM has a strong incentive and the ability to impair the introduction of HD Radio technology into the marketplace. iBiquity again urges the Commission to expeditiously initiate a proceeding to develop the appropriate rules that will ensure the market works properly and prevents Sirius XM from blocking the rollout of HD Radio technology.

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<sup>1</sup> See *Application for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, FCC 08-178 (rel. Aug. 5, 2008)(“Merger Order”).

<sup>2</sup> See *Development of Devices Capable of Supporting Multiple Audio Entertainment Services*, MB Docket No. 08-172, Notice of Inquiry (rel. Aug. 25, 2008)(“NOI”).

## **I. The Competitive Environment Requires Commission Intervention**

Sirius XM, in its comments, contends there is a broad, robust, competitive market for audio entertainment and as such there is no need for Commission intervention.<sup>3</sup> Sirius XM's position is not supported by the facts and directly contradicts the Commission's conclusions in the Merger Order. Specifically, in the Merger Order the Commission provided a detailed analysis of the market for audio services. In conducting this analysis, the Commission reached several conclusions. First, the Commission concluded that "SDARS constitutes a separate relevant product market."<sup>4</sup> Second, the Commission concluded that the relevant geographic market is national.<sup>5</sup> Third, the Commission concluded "that the proposed merger is likely to harm the public interest by allowing one company to gain increased leverage over the terms and conditions of the contracts for the manufacture of SDARS radios."<sup>6</sup> In reaching these conclusions, the Commission went on to note that XM and Sirius are intimately involved with the design, manufacture and sale of SDARS receivers.<sup>7</sup> Sirius XM's argument in its comments that the market includes a broad array of technologies and services is at complete odds with Commission findings made a mere four months ago and must be rejected.

Furthermore, a review of the relative market position and relationships of Sirius XM versus HD Radio technology substantiate the Commission's conclusions in the Merger Order. For instance, today there are in excess of 18 million satellite radios in the marketplace. Moreover, at least 41 automobile manufacturers offer satellite radio to their customers as either

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<sup>3</sup> See Comments of Sirius XM Inc., November 10, 2008 at 3-11 ("Sirius XM Comments").

<sup>4</sup> Merger Order at ¶ 66.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

standard or optional equipment.<sup>8</sup> In 2009, 50% of all new cars in the United States are projected to be equipped with Sirius XM satellite radio receivers.<sup>9</sup> On the other hand, HD Radio technology is at a much earlier stage of its rollout. There are currently only six automobile manufacturers offering HD Radio receivers on a limited number of models, most as optional equipment.

It is also important to note Sirius XM has monopoly control over 25 MHz of spectrum throughout the United States. Today, no single terrestrial radio operator controls anything close to 25 MHz in any one market. Rather, as a result of multiple ownership and historic allotment schemes, small slivers of terrestrial radio spectrum are controlled by multiple organizations in each market throughout the United States. iBiquity agrees with NPR that Sirius XM's spectrum monopoly carries a stronger obligation for the FCC to exercise greater regulatory oversight.<sup>10</sup> Further substantiating iBiquity's concern over market function is the fact that today there are no receivers that include SDARS and HD Radio functionality.

As iBiquity has repeatedly emphasized, Sirius XM can discourage the introduction of multifunction devices. Sirius XM can use subsidies, advertising promotions and other tools to discourage the rollout of HD Radio technology. Relatedly, the relationships that Sirius XM has developed with the receiver manufacturers can be easily manipulated to discourage multifunction devices. As Beasley *et al.* noted in its comments, the availability of "subsidies and other financial support would act as a strong deterrent, discouraging manufacturers from developing interoperable SDARS/HD Radio receivers and disincentivizing retailers from making such

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<sup>8</sup> See Comments of the National Association of Broadcasters, November 10, 2008, at 6 ("NAB Comments").

<sup>9</sup> See Joint Comments of Alabama Broadcasters Association *et al.*, November 10, 2008 at 4, ("Alabama Broadcasters Comments").

<sup>10</sup> See Comments of National Public Radio, Inc., November 10, 2008, at 6 ("NPR Comments").

products available to consumers.”<sup>11</sup> Given these facts, there is no credible argument that HD Radio technology and satellite radio compete on a level, competitive playing field. All of the issues discussed in the Merger Order regarding the Sirius XM competitive position still exist, and iBiquity remains justifiably concerned that the monopoly satellite radio provider will attempt to impair iBiquity’s ability to bring product to the marketplace. Thus, iBiquity continues to believe that Commission intervention is urgently required to ensure that the market functions properly.

## **II. The “Open Access” Condition Will Not Resolve Competitive Problems Created By The Merger Order**

The conditions adopted in the Merger Order do not prevent Sirius XM from abusing its competitive position. As iBiquity discussed in its comments, the Open Access condition and the ban on exclusive arrangements do not address iBiquity’s concerns about competition or ensure a level playing field for HD Radio technology.<sup>12</sup> Several of the comments in this proceeding support this view. Clear Channel’s comments noted that the “open access condition has far more to do with prohibiting contractual exclusivity between Sirius XM and potentially competing satellite radio receiver manufacturers and preventing conspiracies in restraint of trade subject to the antitrust laws than it does with preventing practices aimed at stifling HD Radio broadcasting.”<sup>13</sup> Clear Channel goes on to note that the Open Access condition simply does not reach the non-contractual panoply of subsidies, cross-marketing and promotional activities and

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<sup>11</sup> See Comments of Beasley Broadcast Group, *et. al.*, November 10, 2008, at 11 (“Beasley Comments”).

<sup>12</sup> See Comments of iBiquity Digital Corporation, November 10, 2008, at 8 (“iBiquity Comments”).

<sup>13</sup> See Comments of Clear Channel Communications, Inc., November 10, 2008, at 14 (“Clear Channel Comments”).

other arrangements that Sirius XM might use to discourage automobile manufacturers and other vendors from investing in and developing multifunctional satellite and HD Radio receivers.<sup>14</sup>

In considering the impact of the Open Access condition, Sirius XM, in its comments, merely concludes that both HD Radio technology and satellite radio technology can co-exist without Commission intervention.<sup>15</sup> There remains no credible evidence, however, in the merger proceeding or this NOI proceeding to demonstrate that the Open Access condition will ameliorate the competitive problems iBiquity noted above and in its comments. iBiquity continues to believe that the best remedy available to ensure effective competition is to adopt the proposal in the NOI and require the introduction of HD Radio technology in SDARS receivers.

### **III. The Proposed Requirement Will Encourage Innovation, Choice and Availability in HD Radio Technology**

iBiquity disagrees with the comments which assert that a requirement to include HD Radio technology in SDARS receivers would unfairly increase the cost and complexity of those receivers. These arguments are not supported by the facts. Although several comments argue that the cost of satellite receivers will rise significantly as a result of the Commission action,<sup>16</sup> none of the comments raising this issue provide any detailed information on existing or projected costs. Rather, they provide unsubstantiated generalities that do not inform the Commission. iBiquity has provided detailed input to the Commission on this issue in this proceeding and in the Sirius/XM merger proceeding. Specifically, the cost of including HD Radio technology is reasonable and, depending on the type of device, can be implemented on average with an

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<sup>14</sup> *Id.*

<sup>15</sup> *See* Sirius XM Comments at 7.

<sup>16</sup> *See* Comments of Alliance of Automobile Manufacturers, Inc., November 10, 2008, at 3 (“AAM Comments”); comments of Pioneer North America, November 10, 2008, at 1 (“Pioneer Comments”); and Delphi Corporation, October 28, 2008, at 1 (“Delphi Comments”).

additional \$12-20 in material costs. These projections will certainly decrease with an increase in sales volumes.

Sirius XM attempts to argue that the proposed requirement would have particular deleterious impact on low-end and portable radios.<sup>17</sup> This argument ignores the proposal iBiquity has repeatedly presented to the Commission. iBiquity has proposed that any requirement concerning HD Radio technology apply only to satellite receivers that incorporated AM/FM analog functionality. A review of the XM and Sirius websites as well as the Best Buy website indicates that Sirius XM does not offer any portable radios that include AM/FM functionality. Thus, the requirement would not apply to those devices. It would be Sirius XM's decision whether to offer a portable device with or without an FM tuner. If it believed the market did not demand such a device or it was not cost effective or technically feasible to offer such a device, Sirius XM would be free to continue to sell portable units without FM functionality.

Ford argues that the proposal would eliminate incentives to reduce costs while Pioneer contends it would eliminate product choice.<sup>18</sup> Both the consumer electronics and automobile industries are highly competitive and repeatedly demonstrate strong economic forces to reduce cost and expenses. Even if there is a requirement for Sirius XM to include HD Radio technology in SDARS receivers, it is difficult to understand how this will discourage suppliers to the automobile industry from competing to provide the lowest cost multifunction radio. It is also difficult to understand how the inclusion of additional functionality in the receiver would eliminate product choice, as Pioneer asserts. Existing HD Radio products in the marketplace are

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<sup>17</sup> See Sirius XM Comments at 13.

<sup>18</sup> See Comments of Ford Motor Corporation, November 10, 2008, at 1 and Pioneer Comments at 1.

compatible with a wide range of complimentary services and features. Unless there is a more specific record developed on this issue, the Commission should ignore these unsubstantiated concerns.

Sirius XM's argument that the proposal will create consumer confusion about the functionality of the devices is also perplexing.<sup>19</sup> The radios this proposal would apply to already have common controls, screens and supporting software for satellite radio and AM/FM analog radio. The introduction of HD Radio technology would merely utilize the controls already in place to access AM/FM analog radio. The proposed requirement would not apply to stand-alone satellite radios that do not contain AM/FM functionality. Thus, it is difficult to ascertain what is the real concern of Sirius XM about device functionality.

iBiquity is confused by Pioneer's argument that the proposal would decrease AM/FM tuner performance.<sup>20</sup> As Pioneer is aware, a fundamental tenet of the HD Radio design is that the digital signal blends to analog upon loss of the digital signal, so there is no loss of AM/FM coverage. The numerous HD Radio devices in the marketplace demonstrate the introduction of HD Radio technology does not impact the reception of analog signals by the device. It is unclear why Pioneer thinks the introduction of HD Radio functionality will impact AM/FM tuning.

Jaguar indicates that the introduction of HD Radio functionality would require a redesign of the electrical system in its cars.<sup>21</sup> This argument is not supported by any details. iBiquity's proposal on this topic has always specified that the Commission should provide three years for automobile industry to adapt its receivers. In the absence of more specific information, it is

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<sup>19</sup> See Sirius XM Comments at 12.

<sup>20</sup> See Pioneer Comments at 1-2.

<sup>21</sup> See Comments of Jaguar Cars Limited and Land Rover, October 29, 2008, at 1.

difficult to understand why a redesign of the electrical system would be necessary. The basic parts of the radio, including the display and associated software would not change as a result of the introduction of HD Radio functionality. If Jaguar has some unique constraints that the Commission needs to address, those issues could be resolved on a case-by-case basis but should not preclude the Commission from moving forward with the proposed requirement.

#### **IV. FCC Has Jurisdiction to Implement the HD Radio Requirement**

Sirius XM contends that the FCC lacks express and ancillary jurisdiction to require the inclusion of HD Radio technology in SDARS receivers and argues that the Commission's express authority over receiver manufacturing is very limited.<sup>22</sup> The Sirius XM argument, however, misconstrues the proposed requirement and ignores relevant precedent in this area. The HD Radio proposal does not seek direct FCC regulation of radio receivers. Rather, iBiquity has suggested the FCC should impose requirements directly on the SDARS licensee and SDARS service. As NPR notes, the Commission has asserted authority over SDARS receivers since first initiating the SDARS service. Indeed the Commission mandated SDARS receiver interoperability so that all consumers would be able to purchase any SDARS receiver and access any SDARS service.<sup>23</sup> The Commission's jurisdictional authority to impose requirements on Sirius XM concerning SDARS receivers licensed by the SDARS licensee is further substantiated by the Merger Order. The Open Access and exclusive contracts conditions are just two examples of the Commission imposing receiver requirements on Sirius XM.

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<sup>22</sup> See Sirius XM Comments at 15.

<sup>23</sup> See NPR Comments at 11-12.



**V. There Is No Need to Impose A Reciprocal Requirement on All HD Radio Receivers**

The proposed requirement concerning HD Radio technology is designed to remedy competitive market dysfunctions resulting from the XM/Sirius merger. There is no evidence that the competitive concerns demand that a reciprocal provision be adopted to promote the SDARS monopoly provider. Sirius XM argues that any requirement should apply equally to SDARS and HD Radio technology.<sup>24</sup> However, Sirius XM fails to recognize the existing competitive landscape. Today, Sirius XM has in excess of 18 million subscribers, relationships with virtually every automobile manufacturer and significant shelf space at all major electronic retailers. HD Radio technology is in a much different competitive position. Only 15% of U.S. radio stations have adopted HD Radio technology and HD Radio receiver sales are a fraction of SDARS receiver sales. Moreover, iBiquity has significantly fewer relationships with the automobile manufacturers and substantially less shelf space at electronic retailers. The proposed requirement concerning SDARS receivers is needed to remedy competitive problems in the marketplace and ensure a monopoly SDARS provider cannot act to skew the marketplace in an anticompetitive fashion. There are no competitive concerns that would require a reciprocal arrangement.

**VI. The Adoption of the HD Radio Requirement Will Serve the Public Interest**

Since the Commission began to consider the introduction of HD Radio technology, it has recognized the numerous benefits this technology can offer to the public.<sup>25</sup> Whether improved quality and reliability, new entertainment services or new innovative digital services, the

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<sup>24</sup> See Sirius XM Comments at 19.

<sup>25</sup> See *Digital Audio Broadcast Systems and Their Impact on the Terrestrial Radio Broadcast Service*, (Notice of Proposed Rulemaking), 15 FCC Rcd 1722 (1999); (First Report and Order), 17 FCC Rcd 19990 (2002); and Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344 (2007).

Commission has strongly promoted the development and implementation of HD Radio technology. NPR in its comments discusses many of the exciting new services it is developing to make radio more accessible to both print and hearing-impaired communities.<sup>26</sup> Clear Channel notes that HD Radio broadcasting is a vital technology that “provides free local radio stations with the best opportunity to offer listeners enhanced choice in today’s competitive digital audio marketplace.”<sup>27</sup> There is little doubt that the proposed HD Radio provision will enhance the ability of the technology to more expeditiously reach the public and provide many exciting new programming and data services. In order to ensure that the public is able to reap all the benefits of this important new technology, it is crucial that the Commission establish the appropriate competitive environment that will allow HD Radio receivers to reach the marketplace.

### **CONCLUSION**

For all the above reasons, iBiquity encourages the Commission to initiate a rulemaking proceeding to require that Sirius XM includes HD Radio technology in the SDARS receivers that provide analog AM/FM radio.

Respectfully submitted,

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<sup>26</sup> See NPR Comments at 3.

<sup>27</sup> See Clear Channel Comments at 4.